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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS,

Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

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Respondent.

REPLY BRIEF OF PETITIONER

Respondent urges this Court to disregard the fact that Petitioner was denied the right to be heard through counsel since Petitioner did not spell out "any meritorious legal point which a lawyer could have urged to the trial court in his defense." Such a contention is, of course, absolutely untenable since Petitioner's right to be heard through his own counsel was unqualified (*Chandler* v. *Fretag*, 348 U.S. 3, 99 L. Ed. 4, 75 S. Ct. 1) and not conditioned upon the defenses that counsel might have been able to present. Respondent's reasoning seems to be that it was not only in accord with due process for the trial court to have denied Petitioner's request for a continuance so that he might have the benefit of skilled counsel but that it is also due process to deprive him of the right to be heard on his complaint of such denial since he himself did not have the legal skill

required to spell out in his Petition the precise legal points which a lawyer might have urged in his defense. Such fallacious reasoning, if allowed to prevail, would result in a travesty of the justice upon which our judicial system is founded.

Petitioner did assert that "he is being held, detained and deprived of his personal freedom without due process of law, further, that the trial court violated his constitutional rights and the fundamental fairness that is so essential to the very concept of justice." That assertion was sufficient to cause the Florida Supreme Court to consider whether the trial court was correct in declaring, "You do not need counsel in this case." However, had counsel been allowed to represent the Petitioner he might have pleaded the following meritorious defenses before the trial court:

1.

Invalidity of Arrest

First, counsel could have attacked the validity of Petitioner's arrest. The Florida Statutes provide for arrest (other than in specific cases not pertinent here), only after a valid warrant *charging a crime* has been issued. In *Roberts* v. *Dean*, 133 Fla. 47, 136 Fla. 421, 187 So. 571 (1938), and *Williams* v. *State*, 97 Fla. 401, 121 So. 462 (1929), the Florida Supreme Court clearly affirms the rule that a warrant of arrest in order to be valid, must sufficiently charge a criminal offense. Since the Second Offender Statutes admittedly do not create an offense (*McDonald* v. *Massachusetts*, 180 U.S. 311, 313, 42 L. Ed. 542, 547, 21 S. Ct. 389; *Graham* v. *West Virginia*, 224 U.S. 616, 623, 624, 56 L. Ed. 917, 920, 921, 32 S. Ct. 583), Petitioner was deprived of his freedom by his arrest on the basis of a warrant charging no crime whatsoever.

Section 775.11 Florida Statutes 1957 provides:

"... the Court ... shall cause said person, whether confined in prison or otherwise, to be brought before it ..."

Assuming that the above statute could validly authorize the Court to require a person who had not yet completed his prison sentence to come before it for re-sentencing, yet the phrase "whether confined in prison or otherwise" certainly cannot be validly interpreted to authorize the arrest of a person who has completed his sentence. There is nothing either in the body or the title to the Second Offender Statutes revealing that they were intended to constitute a legal basis for a valid warrant of arrest in derogation of the explicit requirement of Section 901.15 Florida Statutes 1957,[1] that an arrest on the basis of a warrant may be made:

"(4) When a warrant has been issued *charging any criminal offense* and has been placed in the hands of any peace officer for execution." (Emphasis supplied.)

2.

Right to Construction of Sections 775.09 and 775.11 Florida Statutes by Supreme Court of Florida.

Respondent assumes that the result of Section 775.11, Florida Statutes, 1957, is to remove any time limitation whatsoever against the filing of a Second Offender Information. This assumption is not only unwarranted but completely erroneous in view of the Florida Supreme Court's own expression on that point in the two cases where it considered the problem.

In *State* v. *Nelson*, 160 Fla. 744, 37 So. 2d 427 (1948) the Court said:

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[1] Sec. 901.15 (2 Fla. Stat. 1957, p. 2911, Sec. 901.15).

> "Whether or not in this jurisdiction there is any limitation of time on the Court's power to impose sentence as provided by Section 775.09 supra, it is our conclusion that under the facts and circumstances it has not expired in this instance."
>
> 37 So. 2d p. 429.

The Florida Supreme Court in *Milan* v. *State of Florida*, 102 So. 2d 595 (1958) again pointed out that it has not decided whether there is a time limitation on the imposition of a sentence under Section 775.09:

> "The first of the above questions as posed is not before the Court because there is no showing that appellant had actually served his entire sentence for the second offense before the amended information was filed charging him with being a second offender. *On this question there is a difference of opinion among the members of the Court, but as it is not ripe for determination under the record here, no useful purpose could be served by discussing it.*" (Emphasis supplied.)
>
> 102 So. 2d at p. 596.

The question, therefore, as to whether §775.11, Florida Statutes, 1957, should be literally interpreted so that the phrases "at any time after sentence or conviction" and "whether confined in prison or otherwise" mean at any time even after the last sentence has been fully served (whether three months or fifty years), has not been decided by the Florida Supreme Court, and Petitioner had a right to have this question answered by the highest court of this state before such a literal interpretation could be assumed. In view of the fact that the Florida Supreme Court specifically refrained from deciding this question in the two cases cited above, the Court certainly could not have intended

to answer this question by a per curiam denial of Petitioner's Petition for Writ of Habeas Corpus, where there were no briefs, there was no argument, no counsel, nor even a hearing.

3.

Questions of the Constitutionality of Sections 775.09 and 775.11 Florida Statutes 1957 Under the Constitution of Florida.

The constitutionality of Sections 775.09 and 775.11 Florida Statutes, 1957, as applied to the facts in Petitioner's case is questionable by reason of the following:

The Constitution of the State of Florida requires that all legislative bills must contain only one subject, that subject must be indicated in the title, and any statute being amended must be published at length; otherwise the bill is void.[2]

The title to *Chapter 12022, Laws of Florida 1927* which is the forerunner of Sections 775.09, 775.10 and 775.11, Florida Statutes, 1957 as enacted in 1927 read:

> "An Act Prescribing Punishment for Persons Who Have Been Twice Convicted of a Felony, and Prescribing Punishment for Persons Who Have Been Convicted Four Times for a Felony and Prescribing Procedure in Such Cases."

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[2] Section 16, Article III, Florida Constitution (Vol. 3, Fla. Statutes 1957, p. 3061, Section 16):

> "Acts; one subject; expressed in title; amendments.—Each law enacted in the Legislature shall embrace *but one subject* and matter properly connected therewith, which subject shall be briefly *expressed in the title*, and no law shall be amended or revised (by reference) to its title only; but in such case the act as revised or section . . . as amended *shall be re-enacted and published* at length." (Italics supplied.)

Since the purpose of Section 16, Article III, Florida Constitution, is to prevent surprise or fraud upon the people and to give notice to the Florida Legislature of the provisions in the body of a bill, it is obvious that the title to the Florida Second Offender Act, quoted above, does not fulfill that purpose. This title merely gives notice of enhanced punishment for second and fourth offenders. The words "prescribing procedure" give no indication of the substantive matters contained in the body of the bill, and are therefore gravely misleading.

The substantive rights affected by the body of the bill are the right of a person to be sentenced only by a Court having jurisdiction of the subject matter of the crime for which the accused is convicted and sentenced and the right to be free from arrest unless the warrant issued charges a crime (or unless the arrest is otherwise valid under applicable laws not pertinent herein).

Sec. 775.01 F.S. 1957 provides:

"*Common Law of England*—

> The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this State where there is no existing provision by statute on the subject."

Under the common law of England in relation to crimes the moment that sentence was pronounced there remained only a ministerial duty of overseeing the execution of the sentence and the courts thereupon lost jurisdiction of the subject matter of that crime. The mere inclusion of the words "at any time" in the Florida Second Offender Statute does not give notice that this statute was intended to give jurisdiction to a court that had long before lost jurisdiction

of the subject matter of a second offense. Certainly the abrogation of such a substantive right would require notice to the people and to the legislature of the amendment of Section 775.01 Florida Statutes, and the specified requirements of Section 16, Article III, Florida Constitution would have to be followed.

Chapter 901, Florida Statutes specifically provides that a warrant of arrest may be issued only where there is reasonable ground to believe that an offense has been committed, specifies that the warrant shall set forth substantially the nature of the offense, and provides that arrest by an officer without a warrant is lawful under certain circumstances not relevant to the instant case and also when a warrant has been issued *charging any criminal offense* and has been placed in the hands of any peace officer for execution. The mere inclusion of the words "whether confined in prison or otherwise" in Sec. 775.11, F.S., 1957 cannot validly be construed to vitiate the express requirements of Chapter 901, Florida Statutes, for such a construction contemplates a drastic abridgment of substantive rights.

The phrases "at any time" and "whether confined in prison or otherwise," therefore, as interpreted by Respondent, render Sec. 775.11 unconstitutional, since they are in conflict with other existing statutory provisions which are not specifically amended by the Second Offender Act and since they constitute two additional subjects in the Second Offender Act, contrary to the provisions of Section 16, Article III of the Florida Constitution.

In *State* v. *Tindell*, Fla., 88 So. 2d 123 (1956) an act relating to the prosecution of homicides by the State Attorney was held unconstitutional by the Florida Supreme Court because the subject matter was broader in scope than was indicated by the title. In *Copeland* v. *State*, Fla., 76 So.

2d 137 (1954) the Florida Supreme Court held that so much of the Child Molester Act of 1953 as applied to rape and the penalty therefor violated Section 16, Article III of the Florida Constitution because (1) the Act embraced eleven different crimes denounced by other statutes of the State of Florida, (2) it did not publish at length the statutes with reference to rape which it attempted to amend, and (3) the title of the Act was insufficient to give notice that one of the purposes of the Act was to change the penalty for rape under certain circumstances. Under the rationale of the *Tindell* and *Copeland* cases, the Second Offender Act of Florida, Sections 775.09 through 775.11, if given the literal interpretation urged by Respondent, must be held to violate Section 16, Article III of the Florida Constitution inasmuch as:

1. The title of the Act is insufficient to give notice of the abridgment of substantive rights that the statute contains.

2. The Act embraces at least three different subjects, i.e. (a) enhancement of the penalty for second and subsequent offender, (b) enlargement of the jurisdictional power of criminal courts, and (c) validity of arrest on the basis of a warrant not charging an offense.

3. The bill enacting the Florida Second Offender Act does not publish the statutes with reference to abrogation of the common law and with reference to the prerequisites for a valid arrest which it attempts to amend.

4.

Due Process

The Florida Second Offender Act as applied to the Petitioner, who had completely served the second sentence imposed upon him, violates the due process clause of the

Constitution of the United States. It is not due process for the State of Florida, in the absence of any evidence that the Petitioner concealed his identity and in view of the ready availability of the record of the first conviction of Petitioner in the same county in which the second conviction occurred, to postpone any action against Petitioner under the Second Offender Act until he had completely served his second sentence and had been at liberty for three months. Such a case offends against the concept that one of the primary reasons for punishment is rehabilitation. It should be considered that the Supreme Court of Florida in the instant case, in view of the previous division in the Court and the failure of the Court to decide the question, has not construed the Florida Second Offender Act; it is therefore submitted that this Honorable Court should so construe the statute as not to apply to the Petitioner under the circumstances of this case in order to avoid its unconstitutionality under the due process clause.

Conclusion

Thus contrary to Respondent's assertions in his brief, had Petitioner been granted a continuance so that he might have had benefit of counsel, he could have, through counsel, asserted the foregoing defenses. To assert, therefore, that the only issue involved was whether or not the Petitioner had suffered the two prior convictions alleged in the Information of Second Offender, and that his legal need must be considered only in that light, is in itself a perpetuation of the attitude of the trial Judge who convicted Petitioner without regard to his statutory or constitutional rights. Respondent's hindsight (using the term he himself suggests) as to what Petitioner might have done though his counsel *after conviction* lacks persuasion and is immaterial. Petitioner having the right to be heard through counsel, he had that right *before* conviction.

It takes no "judicial sorcerer's stone" but requires only the concept of fair play to realize that in the light of the many defenses available to Petitioner, Petitioner was denied the protection to which he was constitutionally entitled under the due process clause of the Fourteenth Amendment to the United States Constitution—the right to be heard through counsel.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 115.—October Term, 1960.

Stephen Franklin Reynolds, Petitioner. v. H. G. Cochran, Jr., Director of Division of Corrections, Florida.	On Writ of Certiorari to the Supreme Court of Florida.

[March 20, 1961.]

Mr. Justice Black delivered the opinion of the Court.

In 1956 petitioner was convicted of grand larceny in the Criminal Court of Polk County, Florida, and sentenced to serve two years in prison. In December 1957, with time for good behavior, petitioner was released from prison and discharged from custody as an absolutely free man. Some two months after his release and discharge, the Polk County prosecutor filed an information against petitioner charging that he "has been convicted of two (2) felonies under the laws of the State of Florida, contrary to Section 775.09, Florida Statutes, 1957 [1] . . . and against the peace and dignity of the State of Florida." The two convictions referred to were the 1956 conviction for grand larceny and a 1934 conviction for robbery for which peti-

[1] "A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction. . . ." Fla. Stat., 1957, § 775.09.

tioner had also completely served his sentence. Upon the filing of this information, petitioner was promptly arrested, arraigned and, according to the judgment of the trial court, "did then and there freely and voluntarily plead guilty to the Information filed." The court then proceeded to find petitioner "guilty of the offense of Second Offender" and ordered that for "said offense, [he] be confined in the State Prison of Florida at hard labor for a term of Ten (10) Years." [2] Petitioner later brought this original petition for habeas corpus in the Supreme Court of Florida challenging his confinement under this judgment on the ground that it was not authorized by the Florida second-offender statute and that it violated both the State and the Federal Constitution in several different respects. Despite the fact that none of the charges made by petitioner were denied by the State, the Florida court dismissed his petition without a hearing.[3]

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[2] The theory used by the State in its proceedings against petitioner, as disclosed by the quoted recitals of the information and judgment, seems to be completely at variance with that upon which multiple-offender proceedings are normally based. For normally the punishment provided for in a multiple-offender statute is viewed as increased punishment for the last offense in the sequence. Here, on the other hand, the theory seems to have been that petitioner, by virtue of his convictions for two previous offenses, has committed a third and entirely separate offense—to quote the judgment, "the offense of Second Offender." Because of the disposition we make of this case on other grounds, however, we need not reach the questions posed as to the constitutionality of confinement based upon such a theory. In any event, prior opinions of the Supreme Court of Florida indicate that there might be room for considerable doubt whether § 775.09 authorizes confinement on such a theory. See *Cross* v. *State*, 96 Fla. 768; *Washington* v. *Mayo*, 91 So. 2d 621.

[3] The Supreme Court of Florida issued no opinion, the case being disposed of with the following order: "The above-named petitioner has filed a petition for writ of habeas corpus to be issued to the respondent in the above entitled cause, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied."

We granted certiorari to consider the correctness of this peremptory denial of the petition in view of the serious nature of the charges made.[4]

Since it is conceded by the State that the federal questions presented here were properly raised and passed on below, and since it is clear that for the purposes of this proceeding the facts set forth by petitioner must be accepted as true,[5] we go directly to the charges made in the petition. Those charges were clearly stated by petitioner himself in the following excerpt from his rather crudely drawn application for habeas corpus:

> "Your petitioner would show this Honorable Court that at the time of his arrest he was living in Valusia County, DeLand Florida, that he was arrested without a warrant, that he was arrested on strength of a pick up order from Sheriff Office, Bartow, Polk County, Florida, that the arresting officer, a deputy sheriff of Volusia County did not know why he was arresting your petitioner and did not have a warrant to make a legal arrest, further that your petitioner was taken against his will across five (5) county lines. The said county lines being Volusia, Seminole, Orange, Osceala, into Polk County all of the State of Florida, without his knowing why he was arrested or the arresting officer knowing why or what charge he was making arrest for; Your petitioner was taken across the afore said counties by the arresting officer, a deputy sheriff of Volusia County, Florida.
>
> "Your petitioner contends that once he was in the clutches of the Criminal Court of Record in and for Polk County Florida; he was a convicted person before he was ever tried.

[4] 363 U. S. 801.

[5] *Cash* v. *Culver*, 358 U. S. 633, 634; *Hawk* v. *Olson*, 326 U. S. 271, 273.

"To support the above statement your petitioner would show that he was forced to go before the court against his will; that once before the court your petitioner informed the court that he then had legal counsel on the way to represent him in what ever charge may be; a better description of afore said known by Mrs. Sadie M. Bradley, 317 West Minncasata Avenue, DeLand Volusia County, Florida, and, D. C. Laird; attorney at Law, Lakeland Polk Florida. That petitioner had been arrested on the 18th day of February 1958 in Valusia County, and his attorney was to arrive this morning this date being the 20th day of February 1958, that after being so informed 'the trial court so stated to your petitioner 'you do not need counsel in this case.' Counsel would not be of any assistance you your petitioner, 'No point in calling a Doctor to a man already dead.'

"The trial court then proceeded to read off two (2) convictions from your petitioners record and then asked, You are guilty of these two convictions, are you not? Petitioner saying yes your Honor, but the court, I find, you guilty of being a 'second offender' and sentence you Stephen Franklin Reynolds to ten (10) years in State Prison . . . ."

On the basis of these facts, petitioner contends, among other things, that his confinement is not authorized by the Florida second-offender statute because he had already served the sentences imposed upon each of his prior convictions,[6] and that such confinement violates

[6] Section 775.09, set forth in n. 1, *supra*, is supplemented by a provision which, on its face at least, appears to condone imposition of second-offender penalties even at such a late date: "If *at any time* after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in § 775.09 or § 775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing

the state and federal constitutional prohibitions against *ex post facto* laws and against double jeopardy. It would, of course, be entirely inappropriate under the circumstances of this case for this Court to consider the questions posed under state law. Nor do we find it necessary to consider these particular questions raised under the Federal Constitution beyond the observation that they certainly cannot fairly be characterized as frivolous.[7] For we think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim—that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him.[8]

In *Chandler* v. *Fretag*,[9] we made it emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel

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said person of such previous convictions, whereupon the court in which such conviction was had shall cause said person, *whether confined in prison or otherwise*, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof, according to law, and shall require such offender to say whether he is the same person as charged in such information or not." Fla. Stat., 1957, § 775.11. (Emphasis supplied.)

[7] The problem presented by these questions is rather dramatically stated by petitioner himself in his petition for habeas corpus: "In the instant case how can your petitioner know when in his life he is no longer subject to have his liberty translated to imprisonment, even after expiration of the present sentence, can he again be imprisoned without committing another crime as in the instant case? Surely this Honorable Court will not condone this practice . . . ."

[8] As in *Chandler* v. *Fretag*, n. 9, *infra*, the petitioner here also alleged a denial of due process in that he was not given pretrial notice of the charge against him. But as in *Chandler*, we find it unnecessary to pass upon this contention. See 348 U. S. 3, 5–6, n. 4.

[9] 348 U. S. 3.

in that proceeding. Under the facts of this case, as alleged in the petition filed before the Florida Supreme Court, the decision in *Chandler* is squarely in point and controlling. Under those facts, the statement of this Court in *Powell v. Alabama*,[10] which provided the basis of our holding in *Chandler*,[11] is wholly applicable: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The State seeks to avoid the application of the holding in *Chandler* on the basis of a contention that even if it was error for the trial judge to deny petitioner's motion for a continuance, that error was harmless under the facts of this case. The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding—that he had been convicted of a previous felony in 1934 as charged in the information—a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in *Chandler*. Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed "harmless error,"[12] it is clear that such deprivation was not harmless under the facts as presented in this case. In the first place, petitioner asked for a continuance to enable him to consult with counsel before he admitted the truth of the charge of prior felony conviction. Thus, if petitioner had been allowed the

[10] 287 U. S. 45, 69.

[11] 348 U. S., at 9–10.

[12] It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel.

assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding.[13]

Secondly, and perhaps even more importantly, the State's contention that this factual issue was the only issue in the proceeding seems to constitute an oversimplification of the matter. For, in addition to the constitutional issues mentioned above, able counsel appointed to represent petitioner in this Court has also pointed out that the proceeding involved a difficult question of statutory construction under Florida law. Counsel has pointed out, for example, that the Florida Supreme Court has never had occasion to pass upon the question whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody. In one case in which that question was argued, the Florida court found that it was not properly presented by the facts of the case before it and then went on to say: "On this question there is a difference of opinion among the members of the Court but, as it is not ripe for determination under the record here, no useful purpose could be served by discussing it."[14] Moreover, another decision of that court has indicated that the statute permitting the filing of an information against a second offender "at any time"[15] would not necessarily be interpreted so mechanically as to allow

[13] The proof of prior convictions in a second-offender proceeding may raise difficult evidentiary problems. See, *e. g.*, *Sharpa* v. *State*, 102 So. 2d 809. Moreover, it can be presumed that if an accused second offender were able to make a successful collateral attack upon his first conviction, § 775.09 would not be applied. Cf. *Fields* v. *State*, 85 So. 2d 609.

[14] *Milan* v. *State*, 102 So. 2d 595, 596.

[15] See n. 6, *supra*.

the second-offender statute to hang over a defendant's head to the end of his natural life.[16]

We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value. Plainly, such assistance might have been of great value to petitioner here. The allegations of his petition for habeas corpus indicated, if true, that he had been denied the assistance of counsel he had retained. He is entitled to a hearing to establish the truth of those allegations. The case must therefore be and is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[16] In *Ard* v. *State*, 91 So. 2d 166, the Florida Supreme Court held that the second-offender statute did not apply to a person who had concededly committed two felonies but who had been on probation for five years between the date of his conviction of the second felony and the filing of the second-offender information.